

BBM 343: PUBLIC PROCUREMENT AND LAW

What is Law:

The term law has no assigned meaning. It is used in a variety of senses. Although different writers have attempted to explain the term Law, no generally accepted explanation has emerged.

The study of the nature of law is known as **Jurisprudence**. Persons who explained the term law from the same point of view form a **school of jurisprudence/thought**.

The word **jurisprudence** derives from the Latin term *jurisprudentia*, which means “the study, knowledge, or science of law.” In the United States jurisprudence commonly means the **philosophy of law**. Legal philosophy has many aspects, but four of them are the most common.

The first and the most prevalent form of jurisprudence seek to analyze, explain, classify, and criticize entire bodies of law. Law school textbooks and legal encyclopaedias represent this type of scholarship.

According to **Hart**, Law is a coercive instrument for regulating social behaviour. This is the Command Theory, which assumes that existence of a sovereign, who has the power to impose penalties/sanctions for compliance, which is not necessarily the case.

Marxists postulate the theory that law serves the interests of the dominant classes in society.

This explanation of law cannot pretend to be of universal application.

According to **Salmond**: Law is a body of rules or principles recognized and applied by the state in the administration of justice.

Law has been defined as a body of binding rules of human conduct prescribed by human beings for the obedience of human beings.

In summary therefore, law consists of binding rules. It can therefore be defined as an aggregate or conglomeration of rules enforced by courts of law at a given time.

Rules of law are certain and originate from parliament and various religious practices of a society.

Law and Morality

Morality consists of prescriptions of the society and is not enforceable, however, rules of law are enforceable. Wrongs in society are contraventions of either law or morality or both.

However, law incorporates a significant proportion of morality and to that extent morality is enforceable.

However, such rules/contraventions are contraventions of law for example murder, rape theft by servant or agent.

Types and Classification of Law

Rules of law may be classified as:

- Written and unwritten law
- National and International
- Public and Private
- Substantive and Procedural
- Criminal and Civil

- **Written Law**

These are rules of law that have been reduced into a written form. They are embodied in a formal document for example The Constitution of Kenya, laws made by parliament (statutes). Such laws prevail over unwritten Law.

- **Unwritten Law**

These are rules of law that have not been reduced into written form. They are not embodied in any single document for example **African Customary Law, Islamic Law, Hindu Law, Common Law, Equity**. Their existence must be proved.

- **National or Municipal Law**

These are rules of law operational within the boundaries of a country. It regulates the relation **between citizens and between citizens and the state**. It is based on Acts of Parliament, customary and religious practices of the people.

- **International Law**

It is a body of rules that regulates relations between countries/states and other international persons e.g United Nations. It is based on international agreements of treaties and customary practices of states and general principles.

- **Public Law**

It consists of those fields or branches of law in which the state has an interest as the sovereign eg criminal law, constitutional law, administrative law.

Public law is concerned with the constitution and functions of the various organs of government including local authorities, their relations with each other and with the citizens. Public law asserts state sovereignty/power.

- **Private law**

It consists of those fields or branches of law in which the state has no direct interest as the sovereign of **law of contracts, law of tort, law of property, law of succession.**

Private law is concerned with day to day transactions of legal relationships between persons. It defines the rights and duties of parties.

- **Substantive Law (Business)**

It is concerned with the rules themselves as opposed to the procedure on how to apply them. It defines the rights and duties of parties and provides remedies when those rights are violated e.g. law of contract, negligence, and defamation. It defines offences and prescribes punishment.

- **Procedural Law (Elections)**

It consists of the steps or guiding principles or rules of practice to be complied with or followed in the administration of justice or in the application of substantive law.

It is also referred to as adjective law e.g. Criminal Procedure.

- **Criminal Law**

Criminal law has been defined as the law of crimes. A crime has been defined as an act or omission, committed or omitted in violation of public law e.g murder, manslaughter, robbery, burglary, rape, stealing, and theft by servant or agent.

All crimes or offences in Kenya are created by parliament through statutes. Suspects are arrested by the state through the police. However, individuals have the liberty to arrest suspects. Offences are generally prosecuted by the state through the office of the Attorney General.

- **Civil Law**

Civil law is concerned with violations of private rights in their individual or corporate capacity eg breach of contract, negligence, and defamation, nuisance, passing off trespass to the person or goods.

If a person's private rights are violated, the person has a cause of action. Causes of action are recognized by statutes and by the common law. The person whose rights have been allegedly violated sues the alleged wrong doer. Hence civil cases are styled as Plaintiff v Defendant. It is his duty of the plaintiff to adduce evidence to prove his case the burden of proof lies on the plaintiff.

INTRODUCTION TO PUBLIC PROCUREMENT LAW

"Procurement" means the acquisition by purchase, rental, lease, hire purchase, license, tenancy, franchise, or by any other contractual means of any type of works, assets, services or goods

including livestock or any combination and includes advisory, planning and processing in the supply chain system (**Public procurement Act, 2015**)

Public procurement refers to the process by which **public** authorities, such as government departments or local authorities, purchase work, goods or services from companies. Government procurement, or public procurement, is the procurement of goods and services on behalf of a public authority, such as a government agency. With 10 to 20% of GDP, government procurement accounts for a substantial part of the global economy.

What is public procurement law?

Public procurement law regulates the purchasing by public sector bodies and certain utility sector bodies of contracts for goods, works or services. The law is designed to open up the public procurement market to competition, to prevent "buy national" policies and to promote the free movement of goods and services

Government procurement regulations normally cover all public works, services and supply contracts entered into by a public authority. However, there may be exceptions. These most notably cover military acquisitions, which account for large parts of government expenditures.

Public procurement in Kenya

It is governed by the Public Procurement and Asset Disposal Act 2015, whose full title is "An Act of Parliament to give effect to Article 227 of the Constitution; to provide procedures for efficient public procurement and for assets disposal by public entities; and for connected purposes". This legislation came into effect on 7 January 2016, repealing the previous Public Procurement and Disposal Act of 2005, and all state organs and public entities within Kenya are required to comply with this law in regard to planning and undertaking procurement, inventory management, asset disposal and contract management, except where the provisions of the Public Private Partnership Act, 2013 already apply to procurement and disposal of assets, or where procurement and disposal of assets takes place under bilateral or multilateral agreements between the Government of Kenya and any other foreign government or multilateral agency

Public procurement is an **important function of the government because it has a great impact on the economy and needs to be well managed.**

Procurement encompasses the whole process of acquiring property and/or services. It begins when an agency has identified a need and decided on its procurement requirement. Procurement continues through the processes of risk assessment, seeking and evaluating alternative solutions, contract award, delivery of and payment for the property and/or services and, where relevant, the ongoing management of a contract and consideration of options related to the contract.

Mission of public procurement

The mission of public procurement is **to ensure and enable contracting authorities meet their policy and business objectives in the delivery of better public services**. The public procurement process spans the whole project life cycle from initial conception and definition of the needs of the public service through to the end of the useful life of an asset or the end of a contract.

Goals and objectives of government in public procurement

The following are the goals and objectives of public procurement. The objectives of all personnel involved in public procurement are to:

- Ensure the existence of an **open, transparent and compliant process**;
- Achieve **continuous improvement** on all categories of expenditure through a transparent and fair **procurement process**;
- Achieve Value for Money in all procurement activities;
- **Promote equality of opportunity** for all businesses and in particular SMEs
- Work in partnership with the private sector and other organizations to achieve value for money, quality and effective service delivery;
- Promote innovation
- Encourage **environmental and social sustainability through** effective procurement policies and practices.

Values of Public Procurement

- **Ethics** - Doing the right thing. This value is essential to deserve the public's trust.
- **Impartiality** - Unbiased decision making and actions. This value is essential to ensure fairness for the public good.
- **Accountability** - Taking ownership and being responsible to all stakeholders for our actions. This value is essential to preserve the public trust and protect the public interest. effective mechanisms must be in place in order to enable procuring entities spend the limited resources carefully, knowing clearly that they are accountable to members of the public; competitive supply, which requires the procurement be carried out by competition unless there are convincing reasons for single sourcing; and consistency, which emphasizes the equal treatment of all bidders irrespective of race, nationality or political affiliation.
- **Professionalism** - Easily accessible and understandable policies and processes. This value is essential to demonstrate responsible use of public funds.
- **Transparency** - Easily accessible and understandable policies and processes. This value is essential to demonstrate responsible use of public funds.
- **Service** - Obligation to assist stakeholders. This value is essential to support the public good.
- **Consistency**- Reliability

GENERAL PROCUREMENT AND ASSET DISPOSAL PRINCIPLES

1. All procurement by State organs and public entities are subject to the rules and principles of this Act.
2. An accounting officer shall prepare an annual **procurement plan** which is realistic in a format set out in the Regulations within the approved budget prior to commencement of each financial year as part of the annual budget preparation process.
3. Any public officer who knowingly recommends to the **accounting officer excessive procurement of items** beyond a reasonable consumption of the procuring entity commits an offence under this Act.
4. A procurement and asset disposal planning shall be based on indicative or approved budgets which shall be integrated with applicable budget processes and in the case of a State Department or County Department, such plans shall be approved by the Cabinet Secretary or the County Executive Committee member responsible for that entity.
5. All procurement and **asset disposal planning shall reserve** a minimum of thirty per cent of the budgetary allocations for enterprises owned by women, youth, persons with disabilities and other disadvantaged groups
6. **Multi-year procurement plans** may be prepared in a format set out in the Regulations and shall be consistent with the medium term budgetary expenditure framework for projects or contracts that go beyond one year.
7. Accounting officer shall not commence any procurement **proceeding until satisfied that sufficient funds** to meet the obligations of the resulting contract are reflected in its approved budget estimates.
8. An accounting officer who knowingly commences any procurement process without ascertaining whether the good, work or service is budgeted for, commits an offence under this Act.
9. Any state or public officer who **fails to prepare procurement and disposal plans** shall be subject to internal disciplinary action.
10. No procuring entity may structure procurement as two or more procurements for the purpose of avoiding the use of a procurement procedure except where prescribed.
 - Procurement pricing and requirement not to split of contracts.
 - Standard goods, services and works with known market prices shall be procured at the prevailing market price.
 - The Authority shall issue a quarterly market price index as reference guide to assist accounting officers make informed price decisions.
 - Public officers involved in transactions in which standard goods, services and works are procured at unreasonably inflated prices shall, in addition to any other sanctions prescribed in this Act or the Regulations made thereunder, be required to pay the procuring entity for the loss resulting from their actions.
11. A person is eligible to bid for a contract in procurement or an asset being disposed, only if the person satisfies the following criteria — Eligibility to bid.

- the person has the **legal capacity** to enter into a contract for procurement or asset disposal;
- the person is **not insolvent**, in receivership, bankrupt or in the process of being wound up;
- the person, if a member of a regulated profession, has satisfied all the **professional requirements**;
- the procuring entity is not precluded from entering into the contract with the person under section 38 of this Act; mentally informative
- the person and his or her sub-contractor, if any, is **not debarred** from participating in procurement proceedings under Part XI of this Act;

THE PUBLIC PROCUREMENT AND ASSET DISPOSAL ACT, (2015).

It is an act of Parliament to establish procedures for efficient public procurement and to provide for other related matters.

The purpose of this Act is to establish procedures for procurement and the disposal of unserviceable, obsolete or surplus stores and equipment by public entities to achieve the following objectives —

- (a) To maximize economy and efficiency;
- (b) To promote competition and ensure that competitors are treated fairly;
- (c) To promote the integrity and fairness of those procedures;
- (d) To increase transparency and accountability in those procedures; and
- (e) To increase public confidence in those procedures.
- (f) To facilitate the promotion of local industry and economic development.

Definition of terms

“Procuring entity” means a public entity making a procurement to which this Act applies;

“Minister” means the Minister responsible for matters relating to finance;

Candidate" means a person who has submitted a tender to a procuring entity;

“Advisory Board” means the Public Procurement Oversight Advisory Board

“Authority” means the Public Procurement Oversight Authority

TOPIC 2: PUBLIC PROCUREMENT REFORMS IN KENYA

Challenges facing public procurement reforms

- Guidance for the current procurement system was scattered among various **outdated regulations and procedures**;
- Little action was taken to ensure that the **procurement process complied** with established regulations and procedures; **Lack of compliance to procurement process**
- There were no **clear lines of public accountability** in the procurement process and little transparency; - There was little institutional coordination;
- -Operating through cash budgets and with **inadequate financial planning**, the government was an unreliable business partner and suppliers frequently suffered delays in receiving payment for goods and services supplied; consequently bidders sought to offset these risks by higher prices;
- -The system suffered from various forms of **malpractice and unethical conduct**, including a high incidence of vested interests, interference and insider dealings and occasional cases of retrospective approval of contract awards; and
- There was a **lack of professional knowledge and expertise** in the purchasing and contracting function at all levels

Challenges to public procurement in Kenya

In 1978 the Government issued the Supplies Manual. The manual supplemented by occasional Treasury Circulars governed the public procurement system in Kenya traditionally based on 1978 Supplies Manual. The Director of Government Supply Services which post was established in the 1978 Supplies Manual, was responsible for ensuring proper observance of provisions of the manual. The manual created various tender boards for adjudication of tenders and their awards.

In 1999 a review of the country's public procurement systems was undertaken and from the review, the following issues were discovered:

In Kenya

- There was **no uniform procurement system** for the public sector as a whole.
- The system did not have sanctions **or penalties against persons who breached the regulations** in the Supplies Manual, other than internal disciplinary action. Consequently application of the rules was not strict and many of the norms were not followed.
- The Supplies Manual did not cover procurement of works.
- The dispute settlement mechanisms relating to the award procedures as set out in the **Manual were weak and unreliable for ensuring fairness and transparency.**

- Records of procurement transactions in many cases were found to be **inaccurate or incomplete or absent**, which led to suspicions of dishonest dealings at the tender boards.
- reduced effectiveness of the public financial management,
- **Government's inability to deliver** services efficiently,
- obscure rules not **based on a sound and transparent legal** framework, and
- The system did **not promote fair competition**, thereby rendering it to serious abuse.
- The system did not have **sanctions or penalties** against persons who breached the regulations in the Supplies Manual, other than internal disciplinary action. Consequently application of the rules was not strict and many of the norms were not followed.

Public procurement reforms

- **Transparency, characterized by** - Well-defined regulations and procedures open to public scrutiny; - Clear, standardized tender documents containing complete information; and - Equal opportunity for all in the bidding process;
- **A more effective means for fighting waste and corruption** and improving financial accountability;
- **Integration of the public procurement system** with national budgeting procedures; 4.
- A more attractive investment climate by **lowering risk**;
- **Imposing of heavy penalties** on the offenders of procurement policies and procedures

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- Guidance for the current procurement system was scattered among various outdated regulations and procedures;
- Little action was taken to ensure that the procurement process complied with established regulations and procedures;
- There were no clear lines of public accountability in the procurement process and little transparency; - There was little institutional coordination;
- Operating through cash budgets and with inadequate financial planning, the government was an unreliable business partner and suppliers frequently suffered delays in receiving payment for goods and services supplied; consequently bidders sought to offset these risks by higher prices;
- The system suffered from various forms of malpractice and unethical conduct, including a high incidence of vested interests, interference and insider dealings and occasional cases of retrospective approval of contract awards; and

The systems had other institutional weaknesses that not only undermined its capacity for carrying out their mandates effectively but also led to a public perception that the public sector was not getting maximum value for their money which was being spent on the public procurement transactions.

TOPIC 3: PUBLIC PROCUREMENT PROCESS: OPEN NATIONAL TENDERING

Public procurement process

The process in procurement starts from the initiation of the need by user department and it is approved by the head of the department, as way one of acknowledging the requirement. This has to do with the process of acquiring goods, works and services. It begins when a department has identified a need and decided on its procurement requirement. The process needs to adhere to the laid down procurement process and procedures in order to achieve procurement performance in Kenya. Procurement also extends to the ultimate disposal of property at the end of its useful life (Waters 2004).

This Part sets out the requirements for open tendering. A procuring entity prepares a tender document in which they invite all members of the public to apply for the tender.

The Kenyan procurement process as detailed in the Public Procurement and Assets Disposal Act and Regulations involves several steps.

OPEN TENDERING

A procuring entity shall advertise tenders in the State portal. The procedure for open tender method shall be in accordance with sections 96, 97 and 98 of the Act. The minimum time for preparation of tenders for purposes of section 97(1) of the Act shall be a period of seven days for national and county specific tenders.

Where a procuring entity intends to use an e-procurement system, that procuring entity shall prepare its annual procurement plan through the system and upload it in the State Portal.

A procuring entity shall configure the approval process for annual procurement plans into the e-procurement system to allow for the preparing and publishing of departments or consolidated procurement plans.

The e-procurement system referred to in Regulations 50 and 52 shall be interactive and have the capability to enable bidders participating in a procurement proceeding to request or seek information or clarification.

Where the e-procurement system is in place, procuring entities shall requisition all the procurement and asset disposal requirements through the approved system in regulation 49 through the Procurement function.

INVITATION TO TENDER

The procuring entity shall prepare an invitation to tender that sets out the following: -

- (a) The name and address of the procuring entity;
- (b) The tender number assigned to the procurement proceedings by the procuring entity;
- (c) A brief description of the goods works or services being procured including the time limit for delivery or completion;
- (d) An explanation of how to obtain the tender documents, including the amount of any fee;
- (e) Instructions for the preparation and submission of tenders including —
 - (i) The forms for tenders;
 - (ii) The number of copies to be submitted with the original tender;
 - (iii) Any requirement that tender security be provided and the form and amount of any such security.
 - (iv) Any requirement that evidence be provided of the qualifications of the person submitting the tender.
- (f) An explanation of where and when tenders must be submitted, a statement that the tenders will be opened immediately after the deadline for submitting them and an explanation of where the tenders will be opened;
- (g) A statement that those submitting tenders or their representatives may attend the opening of tenders.

SUBMISSION OF E-TENDERS

The candidates who are desirous of participating in e-procurement shall submit their bids in the standard formats issued by the Authority. (3) The tenderers shall sign all statements, documents and certificates uploaded to take responsibility for their correctness and authenticity.

Opening of tenders

-The accounting officer shall appoint a tender opening committee specifically for the procurement in accordance with the following requirements and such other requirements as may be prescribed:

- The committee **shall** have at least three members; and
- At least one of the members must not be directly involved in the processing or evaluation of the tenders.

- Immediately after the deadline for submitting tenders, the tender opening committee shall open all tenders received before that deadline.

-Those submitting tenders or their representatives may attend the opening of tenders.

-The tender opening committee shall assign an identification number to each tender.

-As each tender is opened, the following shall be read out loud and recorded in a document to be called the tender opening register —

- The name of the person submitting the tender;
- The total price of the tender including any modifications or discounts received before the deadline for submitting tenders except as may be prescribed.
- If applicable, what has been given as tender security.

-The procuring entity shall, on request, provide a copy of the tender opening register to a person submitting a tender.

- Each member of the tender opening committee shall —

- Sign each tender on one or more pages as determined by the tender opening committee; and
- Initial, in each tender, against the quotation of the price and any modifications or discounts.

-The tender opening committee shall prepare tender opening minutes which shall set out —

- A record of the procedure followed in opening the tenders.
- The particulars of those persons submitting tenders, or their representatives, who attended the opening of the tenders.

- Each member of the tender opening committee shall sign the tender opening minutes.

Evaluation of tenders

The procuring entity shall evaluate and compare the responsive tenders

The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and no other criteria shall be used.

The following requirements shall apply with respect to the procedures and criteria —

- The criteria must, to the extent possible, be objective and quantifiable; and
- Each criterion must be expressed so that it is applied, in accordance with the procedures, taking into consideration price, quality and service for the purpose of evaluation.
- The successful tender shall be the tender with the lowest evaluated price.

- The procuring entity shall prepare an evaluation report containing a summary of the evaluation and comparison of tenders.
- The evaluation shall be carried out within such period as may be prescribed.

PRELIMINARY EVALUATION

Pursuant to section 80 of the Act and upon opening of tenders, the evaluation committee shall first conduct a preliminary evaluation to determine whether —

- (a) a tenderer complies with all the eligibility requirements provided for under section 55 of the Act;
- (b) the tender has been submitted in the required format and serialized in accordance with section 74(1)(i) of the Act;
- (c) any tender security submitted is in the required form, amount and validity period, where applicable;
- (d) the tender has been duly signed by the person lawfully authorised to do so through the power of attorney;
- (e) the required number of copies of the tender have been submitted;
- (f) the tender is valid for the period required;
- (g) any required samples have been submitted; and
- (h) all required documents and information have been submitted.

TECHNICAL EVALUATION

Upon completion of the preliminary evaluation under regulation 74, the evaluation committee shall conduct a technical evaluation by comparing each tender to the technical requirements of the goods, works or services in the tender document.

FINANCIAL EVALUATION

Upon completion of the technical evaluation under regulation 76 of these Regulations, the evaluation committee shall conduct a financial evaluation and comparison to determine the evaluated price of each tender.

- (2) The evaluated price for each bid shall be determined by— (a) taking the bid price in the tender form;
- (b) Taking into account any minor deviation from the requirements accepted by a procuring entity under section 79(2) (a) of the Act; (c) where applicable, converting all tenders to the same currency, using the Central Bank of Kenya exchange rate prevailing at the tender opening date;
- (d) Applying any margin of preference indicated in the tender document.
- (3) Tenders shall be ranked according to their evaluated price and the successful tender shall be in accordance with the provisions of section 86 of the Act.

The evaluation report will be prepared, shall be reviewed by the head of the procurement function and forwarded to the accounting officer together with the professional opinion referred to in Within a day upon receipt of the evaluation report.

Notification of intention to award of contract

- Before the expiry of the period during which tenders must remain valid, the procuring entity shall notify the person submitting the successful tender that his tender has been accepted.
- At the same time as the person submitting the successful tender is notified, the procuring entity shall notify all other persons submitting tenders that their tenders were not successful.
- For greater certainty, a notification does not reduce the validity period for a tender or tender security.

Creation of contract

- The person submitting the successful tender and the procuring entity shall enter into a written contract based on the tender documents and the successful tender.
- The written contract shall be entered into within the period specified but not until at least fourteen days have elapsed following the giving of that notification.
- No contract is formed between the person submitting the successful tender and the procuring entity until the written contract is entered into.

Contract Management and Closeout.

TOPIC FOUR: INSTITUTIONAL AND REGULATORY FRAMEWORK

- ✓ The Kenyan constitution 2010
- ✓ The Public procurement and asset disposal act (2015)
- ✓ Public procurement and Asset disposal regulations (2020)
- ✓ Circulars and Directives
- ✓ Standard procurement manuals

TOPIC FIVE: ALTERNATIVE PROCUREMENT METHODS

1. Restricted tendering

A procuring entity may engage in procurement by means of restricted tendering in such manner as may be prescribed. A procuring entity may use restricted tendering if the following conditions are satisfied -

- (a) Competition for contract, because of the complex or specialized nature of the goods, works or services is limited to prequalified contractors:

(b) The time and cost required to examine and evaluate a large number of tenders would be disproportionate to the value of the goods, works or services to be procured; and

(b) There is only a few known suppliers of the goods, works or services as may be prescribed in the regulations.

2. Direct procurement

A procuring entity may use direct procurement as allowed under subsection (2) **or** (3) as long as the purpose is not to avoid competition.

A procuring entity may use direct procurement if the following are satisfied —

(a) There is only one person who can supply the goods, works or services being procured; and

(b) There is no reasonable alternative or substitute for the goods, works or services.

(3) A procuring entity may use direct procurement if the following are satisfied —

(a) There is an urgent need for the goods, works or services being procured;

(b) Because of the urgency the other available

(c) The circumstances that gave rise to the urgency were not foreseeable and were not the result of dilatory conduct on the part of the procuring entity.

The following shall apply with respect to direct procurement —

(a) The procuring entity may negotiate with a person for the supply of the goods, works or services being procured;

(b) The procuring entity shall not use direct procurement in a discriminatory manner; and

(c) The resulting contract must be in writing and signed by both parties.

3. Request for proposals

A procuring entity may use a request for proposals for a procurement if —

(a) The procurement is of services or a combination of goods and services; and

(b) The services to be procured are advisory or otherwise of a predominately intellectual nature.

4. Request for quotations

A procuring entity may use a request for quotations for a procurement if —

(a) The procurement is for goods that are readily available and for which there is an established market.

(b) The estimated value of the goods being procured is less than or equal to the prescribed maximum value for using requests for quotations.

5. Procedure for low-value procurements

A procuring entity may use a low-value procurement procedure if —

(a) The estimated value of the goods, works or services being procured are less than or equal to the prescribed maximum value for that low value procurement procedure; and

(b) Any other prescribed conditions for the use of the low-value procurement procedure are satisfied.

6. Specially permitted procurement procedure

A procuring entity may use a procurement procedure specially permitted by the Authority which may include concessioning and design competition.

(a) "concessioning" means a procurement that encourages the mobilization of private sector resources for the purpose of public financing, construction, operation and maintenance of development projects and may include build-down and operate, build-own-operate and transfer, build-operate and transfer or similar types of procurement procedures;

(b) "design competition" means a procurement procedure for obtaining competitive bids for services which are creative in nature and which require that part of the services be carried as part of the bid to facilitate evaluation of the bids and such services include architecture, landscaping, engineering, urban design projects, urban and regional planning and fine arts.

7. International tendering

If there will not be effective competition for a procurement unless foreign persons participate, the following shall apply —

(a) The invitation to tender and the tender documents must be in English.

(b) If the procuring entity is required to advertise the invitation to tender, the procuring entity shall also advertise the invitation to tender in one or more English language newspapers or other publications that, together, have sufficient circulation outside Kenya to allow effective competition for the procurement.

(c) The period of time between the advertisement and the deadline for submitting tenders must be not less than the minimum period of time prescribed for the purpose of this paragraph.

- (d) The technical requirements must, to the extent compatible with requirements under Kenyan law, be based on international standards or standards widely used in international trade.
- (e) A person submitting a tender may, in quoting prices or providing security, use a currency that is widely used in international trade and that the tender documents specifically allow to be used;
- (f) Any general and specific conditions to which the contract will be subject must be of a kind generally used in international tendering.

TOPIC SIX: CONTRACTS IN PUBLIC PROCUREMENT

- ▶ The accounting officer shall be responsible for preparation of contracts in line with the award decision.
- ▶ An accounting officer of a procuring entity shall ensure that all contracts of a value exceeding Kenya shillings five billion are cleared by the Attorney-General before they are signed.
- ▶ Each Cabinet Secretary shall regularly inform the Cabinet and national treasury of all government contracts exceeding Kenya shillings five billion.
- ▶ The existence of a contract shall be confirmed through the signature of a contract document incorporating all agreements between the parties and such contract shall be signed by the accounting officer or an officer authorized in writing by the accounting officer of the procuring entity and the successful tenderer.
- ▶ The written contract shall be entered into within the period specified in the notification but not before fourteen days have elapsed following the giving of that notification provided that a contract shall be signed within the tender validity period.
- ▶ If the person submitting the successful tender refuses to enter into a written contract in writing as :
- ▶ He or she shall forfeit his or her tender security and the procurement process shall proceed with the next lowest evaluated tenderer
- ▶ Subject to the regulations, a successful tenderer shall submit a performance security equivalent to not more than ten per cent of the contract amount before signing of the contract.
- ▶ In case the contract is not fully or well executed, the performance security shall unconditionally be fully seized by the procuring entity as compensation without prejudice to other penalties provided for by the Act.

- ▶ subcontracting
- ▶ If the tender documents do not prohibit subcontracting, the successful tenderer may subcontract part of the tender but only if the person to be subcontracted has not been debarred from procurement proceedings in accordance with this Act or has participated in the procurement of goods, works or services related to that contract.
- ▶ The head of the procurement function shall prepare monthly progress reports of all procurement contracts of the procuring entity and submit them to the accounting officer.

Contract close out.

- ▶ An accounting officer of a procuring entity shall close out a procurement contract immediately after completion and the close out shall involve the following—
- ▶ (a) the head of procurement function shall issue a certificate to the contractor confirming delivery and acceptance of goods, works and services, where the contract is not complex and specialized;
- ▶ (b) Where contract under (a) above is complex and specialized, the technical department will issue a certificate to the accounting officer of the procuring entity confirming the quality and quantity of such goods, works and services.

TOPIC SEVEN: DISPOSAL OF STORES AND EQUIPMENTS IN PUBLIC PROCUREMENT

An accounting officer shall establish a disposal committee as and when prescribed for the purpose of disposal of unserviceable, obsolete, obsolescent, or surplus stores, equipment or assets.

An accounting officer of a procuring entity shall ensure that an annual assets disposal plan is prepared of items declared as unserviceable, surplus or obsolete, obsolescence stores, asset or equipment as set out under section 53(4) of the Act.

Pursuant to section 53(4) of the Act, the disposal plan in paragraph (1) shall be done in accordance with the format specified in the Thirteenth Schedule.

(3) An annual disposal plan format referred to in this regulation shall include the following—

- (a) Item description for boarding;
- (b) Quantity;
- (c) Unit of issue;
- (d) Date of purchase;
- (e) Purchase price;
- (f) Estimated current value;
- (g) Justification for disposal;

An accounting officer shall, in accordance with section 163(1) of the Act, establish a disposal committee comprising of—

- (a) A chairperson, who shall be a head of department;
- (b) The head of finance function;
- (c) At least three heads of user departments, of whom one shall be the head of the user department disposing off the stores or equipment;
- (d) The head of the procurement function as secretary or his or her designate.

The quorum for the disposal committee shall be three members including the chairperson.

179. Pursuant to section 163(2) of the Act, the disposal committee shall perform the following functions—

- (a) Conduct board of a survey of items for disposal;
- (b) Verify the condition and the location of the items identified for disposal;
- (c) Determine the current market value of the items for disposal;
- (d) Set up a reserve price based on paragraph (c), where technical advice is not required;
- (e) Verify the justification and procedure for disposal;
- (f) Seek technical expertise where necessary to ascertain the value and the condition of the items; and
- (g) Prepare a disposal report and submit it to the accounting officer, with specific recommendations on the items to be disposed or those not to be disposed and the reasons thereof.

The disposal committee shall be responsible for verification and processing of all disposal recommendations in liaison with the head of procurement function as prescribed.

The employee in charge of unserviceable, obsolescent, obsolete or surplus assets shall bring the matter to the attention of the disposal committee through the head of procurement function.

Disposal procedure.

An employee shall comply with subsection (1) within a reasonable time after the assets become unserviceable, obsolete or surplus.

There shall be a technical report where appropriate by a relevant expert of the subject items for disposal that takes into account the real market price and in so doing, the technical expert shall set up a reserve price which shall be the minimum acceptable price below real market value of the boarded items.

Subject to prescribed restrictions, the disposal committee shall meet within the prescribed period to conduct a survey and review the items, while considering the technical report under subsection (3) and recommend the best method of disposal to the accounting officer.

The Accounting officer shall disclose the reserve price to the prospective tenderers based on the technical report and prices set under subsection (3) of this section.

(6) Where there is no responsive bidder under subsection (5), the accounting officer shall have powers based on the recommendations of disposal committee to revise the reserve price to ensure expeditious disposal of assets and set it forth in the disposal documents so as to be known by any prospective buyer of the boarded items.

After receiving the recommendations of the disposal committee, the accounting officer may approve or reject the recommendation of the committee.

If the accounting officer approves the recommendations of the disposal committee, the assets that became unserviceable, obsolete or surplus shall be disposed-off in accordance with those recommendations

If the accounting officer approves the recommendations of the disposal committee, the assets that became unserviceable, obsolete or surplus shall be disposed-off in accordance with those recommendations.

If the accounting officer rejects the recommendations of the disposal committee he or she shall give further direction on the matter and may refer the matter back to the committee for further consideration.

- (1) Subject to prescribed provisions, an accounting officer of a procuring entity may dispose assets by a method which may include any of the following.

Methods of disposal.

- (a) Transfer to another public entity or part of a public entity, with or without financial adjustment;
- (b) Sale by public tender;
- (c) Sale by public auction;
- (d) Trade-in;
- € Waste disposal management; or
- (f) As may be prescribed.

(2) Despite subsection (1) or any other provisions of this Act, radioactive or electronic waste shall be disposed of only to persons licensed to handle the respective waste under section 88 of the Environmental Management and Co-ordination Act, 1999.

(1) An accounting officer of a public entity shall not dispose-off assets to an employee of the public entity or a member of a board or committee of the public entity except as expressly allowed under this Act and the regulations.

Restriction on disposal to employees, etc.

- (2) An accounting officer who, pursuant to artificial valuation, disposes off assets to an employee of the public entity or a member of a board or committee of the public entity commits an offence.

Despite the provisions of section 166 (1) of the Act, a procuring entity may dispose off unserviceable, obsolete stores, assets and equipment to an employee of a procuring entity, or a member of a board or committee of a public entity where—

- (a) The time and cost required to dispose to any other person is disproportionate to the value of the unserviceable, obsolete obsolescence stores and equipment to be disposed;
- (b) The employee is in possession of the stores item or equipment to be disposed and may be given the first priority to purchase the same;

- (c) assets, stores and equipment are to be disposed of by taking into consideration the net book value or minimum acceptable price set by the technical expert under section 164(3) of the Act, where applicable, at the time of disposal based on government policy.
- (2) The disposal committee of a procuring entity shall set the reserve price for each item to be disposed under these Regulations based on criteria under paragraph (1)(c).
- (3) For greater certainty, employees of a public entity are allowed to participate in disposal processes through public tender and auction provided the employee is not directly involved in the disposal proceeding.
- (4) Every disposal made by a procuring entity under paragraph (1), shall be reported by an accounting officer of a procuring entity to the Authority within thirty days of the disposal.

TOPIC EIGHT: PUBLIC PROCUREMENT REGULATORY AUTHORITY

- (a) Monitor, assess and review the public procurement and asset disposal system to ensure that they respect the national values and other provisions of the Constitution, including Article 227 and make recommendations for improvements;
- (b) Monitor the public procurement system and report on the overall functioning of it and present to the Cabinet Secretary and the county executive member for finance in each county, such other reports and recommendations for improvements;
- (c) Enforce any standards developed under this Act;
- (d) Monitor classified procurement information, including that of specific items of security organs and make recommendations to the Cabinet Secretary;
- (e) Monitor the implementation of the preference and reservation schemes by procuring entities;
- (f) Prepare, issue and publicize standard public procurement and asset disposal documents and formats to be used by public entities and other stakeholders;
- (g) Provide advice and technical support upon request;
- (h) to investigate and act on complaints received on procurement and asset disposal proceedings from procuring entities, tenderers, contractors or the general public that are not subject of administrative review; research on the public procurement and asset disposal system and any developments arising from the same;
- (j) Advise the Cabinet Secretary on the setting of standards including international public procurement and asset disposal standards;
- (k) Develop and manage the State portal on procurement and asset disposal and ensure that it is available and easily accessible;
- (l) Monitor and evaluate the preference and reservations provided for under this Act and provide quarterly public reports create a central repository or database that includes—
- (i) Complaints made on procuring entities;
- (ii) A record of those prohibited from participating in tenders or those debarred;
- (iii) Market prices of goods, services and works;
- (iv) benchmarked prices;

The management of the Authority shall vest in a board to be known as the Public Procurement Regulatory Board which shall consist of—

- (a) A chairperson nominated by the Cabinet Secretary and appointed by the President;
- (b) four members who shall be appointed by the Cabinet Secretary after nomination, through a fair process, by —
 - (i) the Law Society of Kenya;
 - (ii) the Institute of Certified Public Accountants of Kenya
 - (iii) the Kenya Institute of Supplies Management;
 - (iv) the Association of Professional Societies in East Africa, provided that the professional body under subparagraphs (i) to (iii);
- (c) two persons nominated by the respective organizations representing—
 - (i) the youth; and
 - (ii) persons with disabilities.
- (d) the Cabinet Secretary or his or her representative; and
- (e) the Attorney-General or his or her representative.

develop a code of ethics to guide procuring entities and winning bidders when undertaking public procurement and disposal with State organs and public entities;

(q) in undertaking its functions, cooperate with state and non-state actors with a view to obtaining recommendations on how public procurement and disposal can be improved;

(r) ensure the procurement entities implement the preference and reservations and provide data to the Authority disaggregated to indicate the number of disadvantaged groups that have benefitted;

PUBLIC PROCUREMENT REGULATORY BOARD

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 - (i) the Law Society of Kenya;
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- (c) two persons nominated by the respective organizations representing—
 - (i) the youth; and

- (ii) persons with disabilities.
- (d) the Cabinet Secretary or his or her representative; and
- (e) the Attorney-General or his or her representative.

FUNCTIONS OF THE BOARD

- (a) ensure the proper and effective performance of the functions of the Authority;
 - (b) approve and ratify the policies of the Authority;
 - (c) oversee the management, control and administration of the assets of the Authority in a manner and for purposes that promote the object and purpose of the Authority;
 - (d) receive any gifts, grants, donations or endowments made to the Authority;
 - (e) determine the provisions to be made for capital and recurrent expenditure, and for the reserves of the Authority;
 - (f) open bank accounts for the funds of the Authority in accordance with the Public Finance Management Act, 2012;
 - (g) subject to the approval of the Cabinet Secretary, invest any of the Authority funds not immediately required for the purposes of this Act, as it may determine; and
 - (h) co-operate with other organizations undertaking functions similar to its own, whether within or outside Kenya as it may consider appropriate and in furtherance of the functions of the Authority;
- (2) Subject to this Act, the Board may, by resolution either generally or in any particular case, delegate to any committee of the Board or to any member,

DIRECTOR GENERAL

There shall be a Director-General of the Public Procurement Regulatory Authority appointed by the Cabinet Secretary on the advice of the Board.

A person shall not be appointed as a Director- General under this section unless that person—

- (a) Is a citizen of Kenya;
- (b) Has a degree in a related field of study from a university recognized in Kenya, and can demonstrate a logical progression in acquiring the academic qualifications;
- (c) Has at least ten years' experience in senior management position in procurement and supply chain management; and
- (d) Meets the requirements of Chapter Six of the Constitution.

The Director-General shall be responsible for the day to day management of the affairs of the Authority and shall be answerable to the Board in the performance of his functions under this Act.

(2) The Director-General shall perform any other functions determined by the Board or as provided for under this Act.

The Board may designate a member of the staff of the Authority to act as the Director-General during the illness or absence of the Director-General or during a vacancy in the office for a period not exceeding three months within which time the Public Service Commission will have reconstituted the Recruitment Panel to recruit another Director-General.

THE END